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No. 56625-3-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

RAJVIR PANAG, on behalf of herself and all others similarly situated, Respondent/Cross-Appellant

v.

FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic insurance company, and CREDIT CONTROL SERVICES, INC., d/b/a Credit Collection Services, Appellants/Cross-Respondents.

OPENING BRIEF OF RESPONDENT/ CROSS-APPELLANT RAJVIR PANAG

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ORIGINAL

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I. INTRODUCTION

The central issue is whether businesses operating in Washington are permitted to deceive members of the Washington public by asserting that such persons owe an amount certain and due, and is subject to debt collection activities, when, in fact, no such money is certain, owed or due. Here, the specific deceptive scheme employed involves an insurance company, Farmers Insurance Company of Washington ("Farmers"), hiring a debt collection agency, Credit Control Services, Inc. ("CCS"), to collect purported "**AMOUNTS DUE**" using self-styled "**FORMAL COLLECTION NOTICES,**" when the person sent the notice actually owes nothing. The deceptive scheme has been successful and profitable, managing to extract more than 1.5 million dollars from numerous persons in Washington deceived and/or intimidated by the purported collection notices. CP 109-112. The underlying lawsuit was filed to stop the scheme, which by all appearances continues unabated.

II. COUNTERSTATEMENT OF THE ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

1. Does the trial court have authority to order disclosure of contact information of members of a putative class for notice and other purposes, where the nominal plaintiff's claim is found deficient and the putative class has not yet received certification?

2. Does the fact that the Fair Debt Collection Practices Act ("FDCPA") is wholly inapplicable to this matter because, *inter alia*, there was neither a "debt" nor a "transaction" as those terms are defined under that Act, mean that no other statute (such as the CPA) or the common law can provide a basis for relief for the defendants' actionable misconduct?[1]

III. ASSIGNMENTS OF ERROR ON CROSS REVIEW

1. The trial court erred in that part of its July 1, 2005, Order Granting Defendant Farmers Insurance Company of Washington's Motion for Summary Judgment and Deferring Dismissal ("July 1 Order") that granted defendants Farmers and CCS summary judgment as to Ms. Panag's CPA claim.

2. The trial court erred in entering its July 29, 2005, Order Denying Plaintiff's Motion for Reconsideration and which denied plaintiff's Motion for Reconsideration of the trial court's ruling of summary judgment as to Ms. Panag's CPA claim.

IV. ISSUES ON CROSS REVIEW

1. Did the trial court commit reversible error when it granted Farmers and CCS summary judgment on the basis that plaintiff Panag had

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[1] In its opening brief, Farmers all but ignores the orders and issues it actually appealed, and instead claims to assert error in the trial court's failure to dismiss Ms. Panag's claim on its earlier motion to dismiss under CR 12(b)(6). Farmers, however, never included that order in its Notice of Appeal.

not suffered "injury" cognizable under the CPA, when the facts established that Panag had plainly sustained monetary loss and incurred costs and expenses as a direct result of the defendants' deceptive conduct?

2. Does an insurance company occupy some special place under Washington law that permits it to act deceptively, unfairly or tortiously towards anyone it desires, but escape CPA liability just so long as the harmed person is not an insured of the company?

3. Does a plaintiff need to have a direct consumer or contractual relationship with a defendant in order to bring a CPA claim?

4. Does the fact that the FDCPA is, by its terms, wholly *inapplicable* to this matter mean that defendants' deceptive conduct is thereby permissible and is not subject to challenge by law that *is applicable*, such as the CPA?

V. COUNTERSTATEMENT OF THE CASE

In mid-November 2003, Ms. Panag opened an envelope she received in the mail. As she unfolded the letter, her eyes were drawn to oversized, capitalized, reverse color type, which pointedly informed her:

THIS IS A FORMAL COLLECTION NOTICE

The self-styled "formal collection notice" was dated November 10, 2003 (the "November 10 Collection Notice"). CP 455-56.

In line with its self-proclamation, the November 10 Collection Notice prominently displayed the seal of two collection agency associations (the American Collectors Association and the American Commercial Collectors Association) on either side of CCS's trade name, "**CREDIT COLLECTION SERVICES,**" which itself appeared in oversized, capitalized typeface at the top of the notice. CP 455. The notice informed Ms. Panag that she owed an "**AMOUNT DUE**" of **$6,442.53**, and provided instructions for her to make "immediate payment." CP 455. In short, everything about the notice gave the appearance of a standard dunning letter/collection notice for an actual debt, due and owing. CP 455-56.

But no such debt or amount due existed. Even worse, CCS and Farmers knew that no such "debt" or amount due existed. CP 75, 115-17, 486, 495-97.

Several weeks earlier, on October 5, 2003, Ms. Panag had been involved in a two-vehicle automobile accident, in which each vehicle sustained damage. CP 486. Liability for the accident was contested. CP 486. At the time of the accident, defendant Farmers provided automobile insurance coverage to the other vehicle involved (the "Hamilton" vehicle). CP 486. After the accident, Mr. Hamilton apparently made a claim on Farmers for the damages to his vehicle, and Farmers apparently paid for

damages and/or repairs to the Hamilton vehicle pursuant to its insurance policy. CP 486. Farmers asserts that, as a result of the payments it made to its insured, Mr. Hamilton, it became subrogated to his rights. CP 486. At the time, however, Ms. Panag owed Mr. Hamilton (and thus Farmers) absolutely nothing. All Mr. Hamilton possessed was the ability to pursue a tort claim and attempt to establish that Ms. Panag owed him something.

Despite this crucial fact, and knowing that clearly Ms. Panag owed no debt to either Mr. Hamilton or Farmers, Farmers went out and retained a *debt collection agency*, CCS, for the purpose of attempting to collect an amount of money from Panag. CP 495-97. In connection with those efforts, CCS, using its d/b/a of Credit Collection Services, sent the November 10 Collection Notice to Ms. Panag. CP 454-55.

Not getting the desired response from Ms. Panag to the November 10 Collection Notice (*i.e.*, she did not make arrangements for "immediate payment" of the purported "**AMOUNT DUE**"), CCS sent her another threatening collection notice (the "December 1 Collection Notice"). CP 458. Indeed, this second notice stated that it was sent because Ms. Panag had "failed to respond to our notice requesting full payment ...." CP 458. Like the first such collection notice, this one too displayed the name "**CREDIT COLLECTION SERVICES**" in large, capital letters at the top, again flanked by the two collection agency association seals. CP 458.

White-on-black oversize lettering was used this time to emphasize the word "**ATTENTION,**" which was displayed no fewer than *eight* times around the perimeter of the collection notice. CP 458.

As with the first notice, the December 1 Collection Notice reiterated that there was an "**AMOUNT DUE**" of **$6,442.53**. CP 458. The notice further threatened to pursue "full *payment* in accordance with federal and state law(s) ..." (emphasis added). The center of the notice contained yet another ominous threat: "**ACTIVITY PENDING TEN (10) DAYS.**" CP 458.

Once again not receiving the desired response, and still bent on trying to extract money not lawfully owed, on December 22, 2003, CCS sent a third collection notice to Ms. Panag (the "December 22 Collection Notice"). CP 461. Increasing the efforts of deception and intimidation, this third notice added yet more elements of apparent urgency and consequence by printing the collection notice on yellow paper and indicating that it had been sent via "**WESTERN UNION.**" CP 461. In addition, the December 22 Collection Notice threatened additional, debt collection activities, including:

> **1) PERFORMING AN <u>ASSET SEARCH</u> ....**
>
> **2) LITIGATION – WHICH COULD INCLUDE <u>INTEREST</u> ....**
>
> ...

4) PURSU[ING] COLLECTION THROUGH ANY OTHER METHODS PERMITTED UNDER STATE OR FEDERAL LAW.

(Emphases added). CP 461. As with the other collection notices, the December 22 Collection Notice sought to collect a purported "**AMOUNT DUE**" of **$6,442.53**. CP 461.

Besides the fact that an unliquidated, unadjudicated potential tort claim constitutes neither a debt nor an "**AMOUNT DUE,**" both Farmers and CCS each clearly knew no debt existed. For example, if the collection notices were sent in pursuit of an actual, valid "debt," the notices would need to comply with FDCPA, such as including information required by 15 U.S.C. § 1692g.[2] But the self-styled collection notices made no effort to comply with even the most basic requirements of the FDCPA. CP 455-56, 459, 462. In fact, Farmers acknowledged that no debt existed. CP 115-117.[3]

To make matters worse, to the extent Farmers could plausibly claim it believed it was entitled to something as a result of the payments it made to Mr. Hamilton, even Farmers did not believe it was entitled to the

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[2] For example, language informing the alleged debtor that: the collector will presume the debt to be valid unless the debtor disputes the debt within 30 days (15 U.S.C. § 1692g(a)(3)); if the debtor timely disputes the debt, that the collector will obtain and provide verification of the debt (15 U.S.C. §1692g(a)(4)); that any information obtained will be used for the purpose of collecting the debt (15 U.S.C. § 1692e).

[3] Farmers' Resp. to Pltf.'s 1st Req. for Admiss., Nos. 3 & 7 ("Farmers denies its subrogation claim is a 'debt' under 15 U.S.C. § 1692a(5).").

$6,442.53 it had hired debt collector CCS to pursue through collection activities as an "**AMOUNT DUE.**" Although this is the amount Farmers apparently paid to Mr. Hamilton, Farmers itself believed that Ms. Panag was not responsible for any more than about one-third of that amount because of, *inter alia*, its own determination (let alone what an impartial jury might decide) on the disputed issue of liability.[4] Even so, Farmers still unilaterally decided to have CCS use its threatening debt collection notices to try to extract $6,442.53 from Ms. Panag. In other words, had Ms. Panag simply paid the purported "**AMOUNT DUE**," Farmers and CCS would have received a windfall of nearly *three times* what Farmers itself determined it might ever legitimately claim.[5] CP 486.

As a result of receiving the "collection notices," Ms. Panag was spurred to take action. She did not, however, take the action obviously desired and preferred by Farmers and CCS (*i.e.*, making "immediate payment"). Instead, she acted to investigate the nature and validity of the alleged debt, and what options were open to her in responding. To that

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[4] Calculations from Farmers' discovery responses indicate it believed it had a claim to no more than $2,061.83. A substantial factor in the result is Farmers' own (likely conservative) determination that its insured was mostly (60% according to Farmers) responsible for the accident. CP 486.

[5] While this does not change the fact that, regardless of Farmers' self-serving determinations as to liability allocations, Ms. Panag owed nothing to Farmers (or its insured, Mr. Hamilton) at the time, it does serve to highlight the mischief that can ensue when you have insurance companies and debt collectors acting as judge, jury and executioner on unliquidated, unadjudicated potential tort claims.

end, she decided to consult with an attorney. CP 86, 105. At the time, Ms. Panag was familiar with an attorney, who happened to be representing her in connection with her claim for personal injuries sustained in the October 5, 2003 automobile accident. CP 467-68. Thus, she decided to consult with this same attorney on the *wholly separate* matter of the purported collection notices.

In investigating the matter, Ms. Panag incurred various costs and expenses. These included motor vehicle operating expense (*e.g.*, cost of gas) and parking expense incurred when she drove to the attorney's office to deliver one of the purported collection notices for his review. CP 93, 95, 97-98, 476. She also incurred vehicle operating expense and parking expense when she again traveled to the attorney's office, this time to meet with him to discuss the purported collection notices. Ms. Panag also incurred postage expense in connection with mailing a copy of the December 22 Collection Notice to the attorney. CP 87, 94, 95, 474-76. Later, she also paid for and obtained a copy of her credit report to determine whether, as CCS has maintained it has the right to do, the purported debt was reported to the major credit agencies. CP 89-90, 104-05, 473.

Ms. Panag's personal injury claim was being handled by her attorney on a percentage basis. CP 468. Thus, although Ms. Panag

retained the same attorney for the "collection notices" matter, it was handled as an entirely separate matter, at an hourly rate basis. CP 81. Since the initiation of the case, Ms. Panag has incurred various out-of-pocket costs and expenses in connection with the matter, and has various other costs and expenses have been incurred on her behalf. CP 103.

During the oral argument on Farmers' motion for summary judgment, the trial court indicated that although it believed that the first three elements of the CPA had been satisfied (*i.e.*, deceptiveness, trade or commerce, and public interest), RP 36-37, the court believed that the costs and expenses Ms. Panag incurred, as set forth above, did not qualify as "injury" under the CPA. RP 36. Thus, by its July 1, 2005 Order, the trial court granted summary judgment in defendants' favor, solely on that ground. *See* July 1, 2005 Order.

Exercising its duty and authority to protect the interests of the putative class, however, the trial court further ordered that Farmers and CCS provide Ms. Panag's counsel with contact information for other putative class members. The purpose of the order was so that such persons could be informed of the litigation, and to permit such persons to act to protect their interests as they saw fit, including determining whether they wished to join or intervene in the case. *See* July 1, 2005 Order.

VI. AUTHORITY & ARGUMENT

A. STANDARD OF REVIEW AS TO SUMMARY JUDGMENT

When reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 662, 63 P.2d 125 (2003); *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). The appellate court "'reviews the facts and law with respect to summary judgment *de novo*.'" *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, __ P.3d __ (2005) (quoting *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995)). "In reviewing the evidence, the trial court *must* consider the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving party." *Id.* (emphasis added) (quoting *Schaaf*, 127 Wn.2d at 21). "Summary judgment is appropriate *only* when, after reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Viking Props.*, 155 Wn.2d at 119 (emphasis added) (citing CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

To affirm the trial court's summary judgment ruling on the issue the trial court found dispositive, this Court must conclude as a matter of law that the costs and expenses Ms. Panag incurred in reacting to protect

her interests after receiving the deceptive, self-styled "collection notices" do not constitute even the *de minimus* "injury" required under the CPA.

B. STANDARD OF REVIEW AS TO THE ORDER TO DISCLOSE CONTACT INFORMATION FOR NOTICE PURPOSES

"[T]he standard of review for the trial court's grant of a protective order and for controlling discovery is abuse of discretion." *Shields v. Morgan Fin., Inc.*, __ Wn. App. __, No. 55542-1-I (Wn. App. Dec. 12., 2005) (citation omitted). "A trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons." *King v. Olympic Pipeline*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000). "Whether a court abuses its discretion in controlling discovery depends on the interests affected and the reasons for and against the decision." *Id.* (citation omitted).

C. THE CPA MUST BE LIBERALLY CONSTRUED TO ENSURE THAT ITS BENEFICIAL PURPOSES ARE SERVED

"The Washington Legislature passed the Consumer Protection Act for a laudable purpose: to protect Washington citizens from unfair and deceptive trade and commercial practices."[6] *Dwyer v. J.I. Kislak*

[6] The beneficial purposes of the CPA are so important that it was amended in 1970 to provide for a private right of action, in addition to existing enforcement actions by the Attorney General. *See Hangman Ridge*, 105 Wn.2d at 784 ("In apparent response to the escalating need for additional enforcement capabilities, the State Legislature in 1970 amended the CPA to provide for a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA.").

Mortgage Corp., 103 Wn. App. 542, 547-48, 13 P.3d 240 (2000), *rev. denied*, 143 Wn.2d 1024 (2001) (citations omitted). Accordingly, the CPA "shall be liberally construed [so] that its beneficial purposes may be served." RCW § 19.86.920. *See also Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986) ("This court continues to give effect to the intended broad construction of these terms."); *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973); *State Farm v. Hunyh*, 92 Wn. App. 454, 458, 962 P.2d 854 (1998) ("The CPA is to be liberally construed to serve its purpose, *i.e.*, to protect the public, and foster fair and honest competition.").

D. EACH OF THE FIVE REQUISITE ELEMENTS FOR A CPA CLAIM ARE PRESENT HERE AS A MATTER OF LAW

A CPA claim consists of the following five elements, and *only* the following five elements: (1) an unfair or deceptive act or practice; (2) occurring in the conduct of trade or commerce; (3) that affects the public interest; (4) injury to plaintiff's business or property; and (5) causation. *See, e.g., Hangman Ridge*, 105 Wn.2d at 785, 787, 792. All five CPA elements exist here as a matter of law.

1. Unfair or Deceptive Act or Practice

This first element for a CPA claim can be satisfied by establishing that the practice or conduct in question constitutes either of two

alternatives: that the conduct is deceptive, or that the conduct is unfair. *See, e.g., Blake v. Federal Way Cycle*, 40 Wn. App. 302, 310-11, 698 P.2d 578 (1985) (discussing unfairness as distinct from deceptiveness). Here, the conduct about which Ms. Panag complains – sending self-styled "Formal Collection Notices" and threatening various debt collection activities in order to extract money when, in truth, no money is owed and no such debt exists – plainly satisfies the *deceptive* conduct alternative for this first CPA element.

The following facts are either uncontroverted or facially apparent: (i) Ms. Panag owed no money or debt to either Farmers or its insured; (ii) Farmers nevertheless hired a *debt collection agency*, CCS, for the purpose of having CCS attempt to extract money from Ms. Panag; and (iii) CCS sent Ms. Panag a notice that not only was designed to appear and be interpreted as an actual debt collection notice, but by its own terms claimed to be a "FORMAL COLLECTION NOTICE" for a purported "AMOUNT DUE."

To satisfy the "deceptive" element, a plaintiff need not establish an intent to deceive.[7] Nor, for that matter, need a plaintiff establish actual

[7] *E.g., Robinson v. McReynolds*, 52 Wn. App. 635, 638 n.2, 762 P.2d 1166 (1988) ("No intent to deceive is required for a Consumer Protection Act violation.") (citation omitted).

deception.[8] Rather, to satisfy the "deceptive" element, a plaintiff need merely establish that the conduct has the *capacity to deceive* a substantial portion of the public. *E.g., Hangman Ridge*, 105 Wn.2d at 785 (citations omitted); *accord Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 592, 675 P.2d 193 (1983). This purposefully low threshold reflects the beneficial purposes underlying the CPA, including the desire to deter deceptive conduct *before* injury occurs. *See Hangman Ridge*, 105 Wn.2d at 785 (citing 60 WN. L. REV. 925, 944 (1985) ("purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs."). In application, the "capacity to deceive" test essentially involves deciding whether reasonable people *could be* misled by the conduct or practice at issue. *See, e.g., Dwyer*, 103 Wn. App. at 547 (holding statement had the capacity to deceive because "a reasonable consumer *could* believe [the] declaration [in question] to mean [something that was not true]") (emphasis added).

This is clearly the case with regard to the November 10 self-styled "FORMAL COLLECTION NOTICE" that CCS, on Farmers' behalf, sent to Ms. Panag (as well as to thousands of other members of the Washington public). The notice was styled as, titled as, and clearly gave the illusion of

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[8] *Dwyer*, 103 Wn. App. at 547 (citing *Aubrey's R.V. Ctr., Inc. v. Tandy Corp.*, 46 Wn. App. 595, 609, 731 P.2d 1124 (1987); *Nelson v. Nat'l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 392, 842 P.2d 473 (1992)).

being, a debt collection notice for an amount of alleged indebtedness "DUE" and owing.[9] A reasonable person receiving such a collection notice could easily be, and many likely were, misled into believing that CCS and Farmers were trying to collect an existing, valid debt that was legally due and owing. Furthermore, a reasonable person receiving such a collection notice could easily be, and many likely were, misled into believing that they had no choice but to pay the purported "AMOUNT DUE" if they desired to avoid the negative ramifications and other unpleasantness associated with the threatened debt collection activities. In short, the self-styled "Formal Collection Notices" possess an inherent and obvious capacity to deceive because a reasonable person easily could be misled into believing the notices to mean something that simply was *not true* – that they owed a valid and legitimate debt, and that they must pay as ordered or suffer the threatened consequences of debt collection activity. *See, e.g., Dwyer*, 103 Wn. App. at 547. Such conduct falls squarely within the "capacity to deceive" test. *E.g., Hangman Ridge*, 105 Wn.2d at 785; *Bowers*, 100 Wn.2d at 592; *Dwyer*, 103 Wn. App. at 547.

Dwyer is particularly instructive. The plaintiffs (the Dwyers) decided to pay off the home mortgage they had with defendant Kislak and

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[9] The deception was furthered and reinforced by the December 1 and December 22 Collection Notices.

refinance with another lender. In order to effect the closing of the new loan and transfer of title, the Dwyers requested Kislak provide them with a payoff statement for the mortgage. *Dwyer*, 103 Wn. App. at 544. Kislak's statement provided: "This statement reflects the amount needed to prepay this mortgage in full;" and then listed, among other amounts, a "Misc Service Chgs" fee of $50.00. The Dwyers paid the entire amount on the statement, and the closing was completed. *Id.* at 544-45. The Dwyers then brought, *inter alia*, a CPA claim against Kislak, asserting that the payoff statement was deceptive "because a reasonable consumer would believe that [it meant] Kislak would not release the mortgage without payment of the miscellaneous service charges included in the stated balance due."[10] *Id.* at 545.

The Court reversed the trial court's entry of summary judgment in favor of Kislak on the CPA claim, stating:

> A *plain reading* of Kislak's statement considered *in light of its purpose* reveals its capacity to deceive a substantial portion of the public. The Dwyers requested the statement to learn the sums due to obtain a release of their mortgage. It is reasonable to assume that Kislak's response would include only those charges actually required to release the mortgage, or if other fees appeared, that they would be specifically identified as extraneous charges that need not be paid in order to obtain a release of the prior lien.

[10] This was untrue because insisting on payment of such fees before reconveying the deed of trust would violate the terms of the deed. *Id.* at 545.

> The document Kislak provided is *entitled*, 'Payoff Statement' and the balance due is headed by a paragraph which begins, 'This statement reflects the amount needed to prepay this mortgage in full.' *Taken at face value*, a reasonable consumer could believe that declaration to mean that unless all sums included on the statement are paid, Kislak will not release the mortgage.

Id. at 547 (emphases added).[11]

Similarly, the "Formal Collection Notice" here, taken at face value and in light of its purpose, could (and likely has) cause reasonable consumers to believe that it is, in fact, a "collection notice" for an existing, valid, legitimate debt that must be paid. This representation, however, is just as untrue as Kislak's implicit representation that the "miscellaneous services charges" had to be paid before the Dwyer's mortgage would be released. Likewise, just as the Dwyers would reasonably assume that Kislak would only include amounts on its payoff statement that actually had to be paid, Ms. Panag (and others receiving the notices) would reasonably assume that CCS and Farmers would only send them "Formal Collection Notices" if they in fact owed existing, valid debts actually subject to debt collection.

As the *Dwyer* Court succinctly put it: "Our holding protects

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[11] *See also Pickett v. Bebchick*, 101 Wn. App. 901, 920, 6 P.3d 63 (2000) (deceptive to represent passenger fees as "government charges, taxes and fees" when they were not those things).

Washington citizens by ensuring that they are clearly and *accurately* informed about the nature and extent of their obligations to Kislak." *Id.* at 548 (emphasis added). Ms. Panag and the others receiving the bogus, self-styled "FORMAL COLLECTION NOTICES" deserve no less.

It should be noted that reaching such a conclusion does not improperly interfere with an insurance company's ability to pursue rights it believes it has acquired by subrogation. It is not the "end" that is of concern here, but rather the "means," because regardless of whether the end may otherwise be lawful (*e.g.*, subrogation recovery), employing unlawful means (*e.g.*, deception) to get there is, of course, still unlawful. For example, although it is clear Ms. Panag owed nothing to either Farmers or CCS, even if she had owed a legitimate debt, it still would be impermissible and unlawful for Farmers or CCS to employ such means as fraud, theft, conversion or deception to collect it.[12] This is in line with *Kislak*, where the Court pointedly distinguished Kislak's right to *charge* various fees (the "end"), versus its right to do so *deceptively* (the "means"):

> In reaching this conclusion, we have taken care not to improperly interfere with Kislak's right to conduct its business. ... Our holding does not infringe on Kislak's

[12] Indeed, if there had been an actual "debt" owed by Ms. Panag, such conduct would be prohibited by, *inter alia*, the FDCPA and Washington's Collection Agency Act, RCW § 19.16.100, *et seq.*

> right to charge a fax fee. *It merely forecloses the ability to do so in a deceptive manner.*

Id. at 548 (emphasis added). In sum, it is not Farmers' and CCS's *mere pursuit* of the subrogation rights Farmers claims that is unlawful, it is the *deceptive conduct* employed by Farmers and CCS in pursuing those claimed rights that is unlawful.

Finally, although it is clear that a plaintiff need not establish actual deception, it bears mentioning that many persons apparently were indeed deceived by the self-styled "collection notices," as this further supports the conclusion that the notices possess the requisite "capacity to deceive." Using notices substantially the same as the ones employed here and in substantially similar circumstances, CCS and Farmers have admittedly extracted more than 1.5 million dollars from persons in Washington between 2002 and 2004. Common sense[13] dictates it is highly unlikely so many would pay so much unless they believed that they were legally obligated to pay it and would suffer adverse consequences if they did not.

2. The Misconduct Occurred in the Conduct of Trade or Commerce

The CPA specifies that "[t]rade" and "commerce" includes not only "the sale of ... services," but "*any* commerce directly *or indirectly*

[13] And the fact that Ms. Panag is entitled to have all reasonable inferences resolved in her favor at the summary judgment stage.

affecting the people of the State of Washington." RCW § 19.86.010(2) (emphasis added). "Prior rulings by [the Washington Supreme Court] have broadly interpreted this provision to include every person conducting unfair acts in *any* trade or commerce." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987) (emphasis added) (citing *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984)).

Farmers and CCS were clearly engaged in trade and commerce in Washington in connection with their "formal collection notice" scheme. CCS, for example, was engaging in purported collection activity – the very heart of its business activities as a collection agency. Farmers, for its part, was claiming to pursue the purported debts pursuant to subrogation rights it claimed in connection with insurance contracts it had issued. In addition, there is the fact that Farmers and CCS had themselves entered into a contractual agreement covering these activities. Such facts easily satisfy the "trade or commerce" requirement.

3. Defendants' Conduct Affects the Public Interest

"[W]hether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed."[14] *Hangman Ridge*,

[14] As with the first two CPA elements, "the public interest element may [also] be satisfied *per se*." *Hangman Ridge*, 105 Wn.2d at 791. "The *per se* method requires a

105 Wn.2d at 789-90. Although the factors applicable vary and can depend on whether the situation involves a public transaction[15] or a private dispute,[16] no one factor is dispositive, nor is it necessary that all be present. *Id.* at 790-911. Instead, "[t]he [exemplar] factors ... represent *indicia of an effect on public interest* from which a trier of fact could reasonably find public interest impact." *Id.* at 791 (emphasis added).

Under these guiding principles, the public interest element is satisfied here as a matter of law. The numerous factors that support such a conclusion include that: (i) the misconduct was performed in the course of the business activities of Farmers and CCS; (ii) their acts are part of a pattern of conduct, as illustrated by the multiple "collection notices" sent to Ms. Panag; (iii) they engaged in similar activities against other members of the Washington public, both before and after that which was

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showing that a statute has been violated which contains a specific legislative declaration of public interest impact." *Id.* (citing *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 762, 649 P.2d 828 (1982)). "Examples of statutes which include a specific declaration of public interest include ... RCW [§] 48.01.030 (public interest in the business of insurance)." *Hangman Ridge*, 105 Wn.2d at 791.

[15] Relevant factors can include: "(1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?" *Hangman Ridge*, 105 Wn.2d at 790.

[16] Relevant factors can include: "(1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?" *Id.* at 790-91.

directed at Ms. Panag; (iv) there is a great likelihood of continued repetition; (v) substantially the same "collection notices" were sent to thousands of other Washington citizens, thus affecting a great many people; and (vi) Farmers and CCS each holds a substantially superior and more powerful position vis-à-vis Ms. Panag or the other numerous individuals to whom they sent the purported "formal collection notices."

While each of the foregoing constitutes "indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact," *Hangman Ridge*, 105 Wn.2d at 791, the requisite public interest is just as clearly established through one simple observation: through this scheme, Farmers and CCS have illicitly obtained more than 1.5 million dollars that does not belong to them, taking it from the pockets of numerous members of the Washington public.

4. Defendants' Deceptive Conduct Caused Plaintiff Injury and Damages

The fourth and fifth elements of a CPA claim are established by showing *either* causally-related injury *or* causally-related damages. *E.g.*, *Hangman Ridge*, 105 Wn.2d at 792. "[U]nder the CPA, injury is distinguished from damages." *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002) (citing *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). *See also Nordstrom*, 107 Wn.2d at 740 ("[injury] requirement is based on RCW [§] 19.86.090,

which uses the term 'injured' rather than suffering 'damages'). The injury element of a CPA claim is met "if the consumer's property interest or money is *diminished* because of the unlawful conduct *even if the expenses caused by the statutory violation are minimal*." *Mason*, 114 Wn.2d at 854 (emphasis added). Indeed, absolutely "[*n*]*o* monetary damages need be proven so long as there is *some* injury to property or business." *Sorrel*, 110 Wn. App. at 298 (citing *Mason*, 114 Wn.2d at 854) (emphasis added). *See also Nordstrom*, 107 Wn.2d at 740 ("the act allows for injunctive relief, clearly implying that injury *without* monetary damages will suffice.") (emphasis added); *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 563, 825 P.2d 714 (1992) (needs to be some injury, "*however slight*") (emphasis added) (citations omitted). In short, "[it is] clear that *no monetary damages need be proven*, and that [even] *nonquantifiable* injuries ... suffice for this element of the *Hangman Ridge* test." *Nordstrom*, 107 Wn.2d at 740 (emphasis added).

Here, the evidence establishes that the injury requirement is satisfied as a matter of law.[17] The "collection notices" clearly made threats and demanded action, and Ms. Panag understandably believed that

[17] Mostly because "injury" does not have to be specifically quantified, it is often the easier of the two alternatives to establish. Thus, for simplicity, this discussion primarily speaks in terms of the "injury" alternative. To the extent that the evidence provides a sufficient basis for quantifying such amounts, however, clearly such amounts also constitute "damages" under this CPA element.

she needed to act to protect her interests. Farmers and CCS, of course, hoped that the action Ms. Panag chose was to send them the money they demanded. Although both defendants knew that Ms. Panag didn't really owe the purported "AMOUNT DUE," the "FORMAL COLLECTION NOTICES" had fooled or intimidated others out of more than 1.5 million dollars, so they undoubtedly had every hope it would work this time too.

While understanding that she needed to act, Ms. Panag chose a different course of action to protect her interests. Rather than simply send in the money demanded, she took action to investigate the matter in order to determine how to proceed and respond to the notices. To do so, however, Ms. Panag was forced to incur various costs and expenses that she otherwise would not have incurred. For example, Ms. Panag incurred costs and expenses associated with operating her motor vehicle, as well as parking expenses incurred during the course of her investigation and while determining how to proceed and respond. She also incurred postage expense during her investigation. In addition, because of the threat represented by the collection notices, and because CCS has maintained that it has the right to report the alleged "debt" to a credit bureau or credit reporting agency if it so desires, Ms. Panag also incurred the expense of obtaining a credit report. Absent her receipt of the deceptive, self-styled "formal collection notices," Ms. Panag would not have been forced to

incur, and would not have incurred, any of these costs and expenses.

Farmers and CCS seek to denigrate the amounts they forced Ms. Panag to incur, and say that these amounts are too small to satisfy the CPA's "injury" requirement.[18] Their argument ignores the fact that when an individual is caused to take money out of his or her pocket by the deceptive and wrongful conduct of another, *any* amount is too much.

More importantly, their argument also ignores the fact that the "injury" requirement is satisfied by a showing of any monetary loss, no matter how small, and regardless of whether it is even quantifiable. *See, e.g.*, *Mason*, 114 Wn.2d at 854 (injury element met "if [plaintiff's] money is *diminished* because of the unlawful conduct even if the expenses ... are *minimal*.") (emphasis added); *Nordstrom*, 107 Wn.2d at 740 ("injury *without monetary damages* will suffice") (emphasis added); *Sign-O-Lite Signs*, 64 Wn. App. at 563 (any injury suffices, "*however slight*") (emphasis added) (citations omitted); *Sorrel*, 110 Wn. App. at 298 ("[*n*]*o* monetary damages need be proven so long as there is *some* injury ...") (emphasis added) (citing *Mason*).

At bottom, any contention that an "injury" can be considered "too small" to justify invocation of the CPA lacks any statutory basis. *See*

[18] Again, to the extent that these can be sufficiently quantified at trial, such amounts also constitute "damages" under this CPA element. This includes, for example, the amount paid for the credit report, as well as parking and other travel costs.

RCW § 19.86.090. Furthermore, any suggestion that either there is, or should be, some minimum level of "injury" (other than something more than nothing) cannot withstand even casual analysis. Plainly, since the statute fails to indicate that any such minimum exists, establishing such a minimum by judicial declaration would impermissibly tread on the authority of the legislative branch to promulgate the laws.

Even so, if a court were to declare a minimum level of "injury" before it would "count" for purposes of the CPA, what would that level be? For not only does the statute fail to provide a basis for a "minimum" amount of injury, but it likewise provides no basis for determining that, for example, $50 is enough, but $25, or for that matter, $9 may not be.[19] Moreover, it is difficult to see how such any such "minimum" amount can be reconciled with the case law that has established that CPA injury need not be quantifiable in the first place. *E.g., Nordstrom*, 107 Wn.2d at 740.[20]

Similarly, any attempt to distinguish the type of the expense incurred as not counting for some reason fails for the same reasons. Specifically, there is nothing in the statute that supports the proposition

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[19] In *Dwyer*, the injury/damages claimed was $50.00. *See Dwyer*, 103 Wn. App. at 544. *See also Strenge v. Clarke*, 89 Wn.2d 23, 30, 569 P.2d 60 (1977) (although addressing a jurisdictional issue, the Court noted that the alleged CPA injury was for only $39.15).

[20] Moreover, establishing a minimum amount would effectively eliminate the statutorily-provided distinction between "injury" and "damages." *See* RCW § 19.86.090.

that travel or postage expenses don't count for purposes of the CPA. As discussed above, whether such expenses are large or small makes no difference. If the deceptive conduct had been of such a nature that Ms. Panag would have, for example, had to fly to Spokane to address the matter, would not the cost of that flight establish the requisite injury or damage? There is no reason to treat the cost of gasoline and parking any differently, or for that matter, postage expense.

Ms. Panag took action to limit the amount of injury she would sustain from her receipt of the deceptive "FORMAL COLLECTION NOTICES." The action she took was to investigate the matter, and in doing so she incurred costs and expenses. Indeed, this is precisely the course of action chosen by State Farm in the *State Farm v. Huynh* case. When State Farm received the chiropractor bills, rather than simply pay the amount claimed, State Farm conducted an investigation and ultimately determined to *not pay* the bills. *See* 92 Wn. App. at 458 ("After State Farm completed its investigation of the incident, it ... refused to pay [the chiropractor's] bills."). Nevertheless, the money State Farm spent *in conducting the investigation* constituted cognizable damages:

> After McKeehen received and read Kiniry's false reports and billings, State Farm continued to investigate this claim for approximately six months. During this time, State Farm incurred expenses for experts, interpreters, transcribers, attorneys, and its employees. ... The costs incurred in

> reviewing and investigating these fraudulent documents therefore constitute damages that were suffered by State Farm.

Id. at 468. The fact that Ms. Panag's resulting injury was, in fact, relatively minimal, is entirely in harmony with the CPA's desire to see that deceptive conduct is stopped before injury occurs. *See Hangman Ridge*, 105 Wn.2d at 785 (citation omitted).

Farmers and CCS further seek to discredit the costs and expenses Ms. Panag incurred during her investigation to the extent they were incurred in connection with consulting an attorney on the matter. That Ms. Panag chose to consult with an attorney, however, is a fact of no consequence. Just like State Farm did upon receipt of the chiropractor's bills, Ms. Panag decided to investigate the matter when she received the collection notices. Just like State Farm, she sought out and consulted with those whom she believed might be able to assist her and provide insight. Indeed, in *State Farm*, part of the investigatory costs incurred by State Farm were the costs for attorneys and experts. *See* 92 Wn. App. at 458. There is no difference.

Farmers and CCS rely on *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 714 (1992). But on this issue *Sign-O-Lite Signs* involves a wholly different context. In the case, Sign-O-Lite filed a breach of contract action against DeLaurenti for a sign the company had

made for her. In response, DeLaurenti asserted a CPA counterclaim. On those facts, the court held that: "DeLaurenti's *mere involvement* in having to defend against Sign's collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property, contrary to the trial court's conclusion." *Id.* at 564 (emphasis added). The court was concerned that: "To hold otherwise would be to invite defendants in most, if not all, routine collection actions to allege CPA violations as counterclaims." *Id.*

First, Ms. Panag has indeed asserted more than her "mere involvement" in this action as evidence of injury or damage. In addition to that involvement, Ms. Panag has also established that *well before her suit was filed*, she incurred various out-of-pocket cost and expenses while investigating and determining her response and course of action after her receipt of the purported "collection notices." She has also established that she incurred the out-of-pocket cost and expense of obtaining a current copy of her credit report in response to the threats made in the "collection letters." These costs and expenses are in complete harmony with the language of *Sign-O-Lite* that: "There must be *some* evidence, *however slight*, to show injury to the claimants' business or property." *Id.* at 563 (emphasis added) (citing *Hangman Ridge*, 105 Wn.2d at 792).

Second, the concern expressed by the *Sign-O-Lite* court is not

present here. There was no existing collection action to which Ms. Panag merely asserted a CPA counterclaim. The misleading "collection notices" made threats and demanded action, and Ms. Panag incurred costs and expenses as a result. Litigation only followed later.[21]

Third, *beyond* the foregoing costs and expenses, Ms. Panag has indeed incurred *additional* costs and expenses in connection with the institution and prosecution of this lawsuit. The actual language of *Sign-O-Lite* is that "DeLaurenti's *mere involvement* in having to *defend* against Sign's collection action and having to prosecute a CPA counterclaim is insufficient to show injury ...."[22] *Id.* at 564 (emphasis added). Even so, defendants cite *Sign-O-Lite* for the proposition that the very real costs and expenses a plaintiff might incur in connection with any lawsuit can never "count" as injury or damages for purposes of the CPA. If *Sign-O-Lite* is indeed meant to stand for this proposition, then Ms. Panag respectfully submits that the Court should take this opportunity to revisit it.

When you have a situation, such as here, where a person is forced to take action to protect herself as a result of the deceptive or unfair

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[21] And, when litigation did commence, it was neither a routine collection matter, nor instituted by someone who had a legitimate claim of a debt.

[22] As noted above, this language can be distinguished from the situation here on two grounds: (i) Ms. Panag has established she incurred costs and expenses well before any litigation commenced; and (ii) there was no existing suit to which she merely counterclaimed.

conduct of others, and part of that protective action is to consult with a professional whom the person believes has the education, skill or training to assist her, the costs and expenses incurred for the consultation and assistance should clearly be considered causally-related injury and/or damages. Indeed, such was the result in *State Farm*.[23]

Furthermore, although the Court need not necessarily go this far, even had the situation been different and Ms. Panag asserted her CPA claim as a counterclaim in a suit brought by the defendants, it is still difficult to see why this distinction should make any difference. Even in that situation, either the action instituted by defendants is legitimate or it is not. If defendants did nothing wrong, then no CPA action would lie. If defendants acted wrongfully, however, then it seems to be a statement of the obvious to say that the CPA plaintiff has suffered injury and damages to the extent she incurred costs and expenses to defend against the wrongful activities. *See St. Paul Ins. Co. v. Updegrave*, 33 Wn. App. 653, 659, 656 P.2d 1130 (1983) (Practically speaking, the greatest expense to be borne by a consumer in defending an action such as the present one is for attorney's fees. ... To say that Lad has not been damaged for purposes

[23] "State Farm incurred expenses for experts, interpreters, transcribers, attorneys, and its employees. ...The costs incurred in reviewing and investigating these fraudulent documents therefore constitute damages ...." 92 Wn. App. at 468.

of the [CPA] is to ignore the obvious.").[24]

E. THERE NEED NOT BE A "CONSUMER" OR "CONTRACT" RELATIONSHIP FOR A CPA CLAIM

Farmers and CCS have previously argued that the lack of a direct "contractual" or "consumer" relationship between the parties is a bar to suits under the CPA. The argument is without merit; it has long been decided by our courts that there need not be a consumer or contractual relationship between a CPA plaintiff and CPA defendant. In fact, there need not be any relationship whatsoever between the parties, other than the "cause and effect" relationship between the defendant's deceptive conduct and the injury or damages sustained by a plaintiff.

As pointedly stated by the Supreme Court:

> "The leading CPA case of *Hangman Ridge* ... does *not* include a requirement that a CPA claimant be a direct consumer or user of goods *or in a direct contractual relationship with the defendant.* Although the consumer protection statutes of some states require that the injured person be the same person who purchased goods or services, *there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods or services.*"

Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 312-13, 858 P.2d 1054 (1993) (emphasis added; citations omitted).

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[24] Although *Sign-O-Lite* rejected the holding in *St Paul* as overbroad, the stated reason was that "no injury to the claimants' business or property was ever alleged," and that "mere involvement" in such an action is insufficient. *See* 64 Wn. App. at 563-64.

Other cases provide further support. For example, in *Nordstrom*, the conduct at the heart of the CPA claim was not even conduct directed at the CPA plaintiff, Nordstrom. Instead, the CPA claim arose from conduct by the defendant that allegedly had the capacity to deceive Nordstrom's *customers*. In other words, the only "consumer relationship" that existed in the case was between the CPA defendant and persons who were not even party to the suit. In this regard, the CPA claim was not even based on conduct directed at the CPA plaintiff.[25] *See* 107 Wn.2d at 733.

Similarly, in *Northwest Airlines, Inc. v. Ticket Exchange, Inc.*, 793 F. Supp. 976 (W.D. Wash. 1992), the CPA claim was based on a ticket broker's brokering of Northwest's frequent flier awards to other travelers. The ticket broker, however, had no relationship or dealings with Northwest, and challenged Northwest's standing to bring a CPA claim for "lack of a 'direct consumer relationship' or 'transaction' between the parties." *Id.* at 979. The court rejected the argument, finding no such requirement, and granted Northwest summary judgment on its CPA claim. *Id.* at 979-80.[26]

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[25] Although the plaintiff and the defendant had certain contractual dealings (the defendant had been a subtenant of Nordstrom), this relationship was not the basis for the CPA claim. *See* 107 Wn.2d at 733.

[26] In *State Farm v. Huynh*, State Farm sued a chiropractor under the CPA for authoring false injury reports. Although the court said it considered State Farm as essentially the "purchaser" of the chiropractor's services for the benefit of its insureds, the fact is State

To support their so-called standing argument, petitioners have previously cited cases involving the breach of the contractual duty of good faith by an insured. Such cases are wholly inapplicable. For example, *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981), merely stands for the proposition that only an insured can bring a *per se* CPA action against an insurer for breaching its contractual duty of "good faith," as an insurer does not owe such a contractual duty to a non-insured (*i.e.*, third party claimant). This has no application here, of course, as Ms. Panag has not asserted a *per se* CPA claim based on an insurer's alleged "bad faith" breach of contractual duties, which is the only CPA claim that would require such a contractual relationship. This is the same with regard to other such "bad faith" cases, including *Marsh v. General Adjust. Bureau, Inc.*, 22 Wn. App. 933, 592 P.2d 676 (1970)[27] and *Bowe v. Eaton*, 17 Wn. App. 840, 565 P.2d 826 (1977).[28] In short, nothing in the line of "bad faith" cases stands for the proposition that an insurer can deceive or otherwise act unlawfully toward any person, as long as that person is not an insured or is in an adversarial relationship with the insurer. *See*

Farm never actually paid for the reports or the chiropractor's bills , and thus never actually engaged in a transaction with the chiropractor. *See* 92 Wn. App. at 458.

[27] Lack of contractual duty owed to a plaintiff in a bad faith context.

[28] Also, *Bowe* is an outdated decision whose holding on the issue has long since been rejected. *See, e.g., Escalante v. Sentry Ins.*, 49 Wn. App. 375, 386, 743 P.2d 832 (1987) (Div. I) ("We decline to follow *Marsh* or *Bowe* for several reasons.").

Dussault v. Am. Int'l Group, Inc., 123 Wn. App. 863, 870-71 (2004) (notwithstanding *Marsh* and *Bowe*, plaintiff – a non-insured *adversary* of an insurer – was not barred from bringing misrepresentation claims against the insurer).

At bottom, to hold that a CPA claim requires a direct "contractual" or "consumer" relationship between the parties would contravene not only established Washington precedent, but the very language of the CPA itself, which expressly provides that "*any person*" who sustains injury or damage has standing to bring a CPA claim. *See* RCW § 19.86.090 (emphasis added).[29]

F. THE FDCPA SIMPLY HAS NO APPLICATION HERE

Farmers' attempts to invoke the FDCPA and claim that its misconduct is protected by that Act.[30] In previous briefing, Farmers appeared to make some sort of a pre-emption argument, essentially asserting that since the FDCPA did not provide a basis for recovery (since there was no "debt" as defined by the FDCPA), its conduct must therefore be lawful and, thereby, bar plaintiff from recovering under any other

[29] *See also Hall v. Walter*, 969 P.2d 224, 233-34 (Colo. 1998) (observing that Washington CPA's "plain language makes [a right of action] available to *'any person'* injured by a violation of the act.") (emphasis added).

[30] Farmers' FDCPA arguments do not relate to the assignments of error noted by Farmers, and is in fact only at issue in connection with Ms. Panag's cross-appeal. These arguments, therefore, should be stricken, as it otherwise gives Farmers an unfair advantage of presenting more argument on the issue than that to which it is entitled.

statute (e.g., the CPA) or legal theory. As discussed below, this argument lacks merit.

Surprisingly, however, Farmers is now apparently taking the position that the alleged "AMOUNT DUE" is indeed a "debt" as defined and covered by the FDCPA, believing that it can escape liability by claiming to be a "creditor" under the Act. While this argument too lacks merit, a more troubling aspect of it may be that it is contrary to the position Farmers has taken throughout this case and, indeed, in its own discovery responses. *See, e.g.*, CP at 115-117 ("Farmers denies its subrogation claim is a 'debt' under 15 U.S.C. § 1692a(5).").[31] That Farmers' argument now is contrary to its previous position and the evidence submitted is, standing alone, a sufficient reason to reject it.[32]

In any event, Farmers' argument is wholly misplaced. The facts in this case do not fall within the acts and conduct covered by the FDCPA, and thus the FDCPA itself is simply inapplicable. Indeed, the overriding theme of the cases Farmers cited on this issue in its previous briefing (a

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[31] Farmers' Resp. to Pltf.'s 1st Req. for Admiss., Nos. 3 & 7. *See also* No. 5 ("Please admit that efforts to collect the purported amount 'DUE' of $6,442.53 are not subject to the FDCPA." Response [after objection]: "Admitted.").

[32] If Farmers was correct, however, and the purported "debt" is covered by the FDCPA and the CAA, then this Court should direct that this case be remanded with directions to enter judgment as a matter of law under such statutes, since the face of the "collection notices" plainly show that they do not comply with the mandatory requirements of either Act. *See* CP 455-56, 458, 461.

number of which it fails to cite now) is merely that the FDCPA did not provide a basis for relief for the claims in question because those claims *did not fall within the coverage* of the FDCPA. The message of these cases, however, is still informing on the issue.

For example, in *Turner v. Cook*, the court noted that: "Because not all obligations to pay are considered debts under the FDCPA, a threshold issue in a suit *brought under the Act* is whether or not the dispute involves a 'debt' within the meaning of *the statute*." 362 F.3d 1219, 1227 (9th Cir. 2004) (citation omitted). After considering the nature of the alleged obligation and concluding that it was not a "debt" within the meaning of the FDCPA, the court simply held: "Hence, the District Court properly concluded that the FDCPA *does not apply*." *Id.* at 1228. Nowhere did the court state that the inapplicability of the FDCPA made any other statute, or the common law for that matter, likewise inapplicable or otherwise unavailable to provide a basis for relief. In fact, the plaintiff's *state law* claims were dismissed *without prejudice*, presumably to permit their pursuit in state court.[33] *See* 362 F.3d at 1225.

Similarly, in *Hawthorne v. Mac Adjustment, Inc.* (cited in *Turner*) the court also noted that "section 1692e makes the existence of a 'debt' a

[33] Similarly, even after finding the FDCPA inapplicable, the court went on to consider whether plaintiff had nonetheless stated a claim under RICO. *See id.* at 1228-31.

threshold requirement for the [FDCPA's] *applicability*," and then, finding no "debt" (as defined by the Act) existed, merely held that the FDCPA did not provide a basis for relief because it was not applicable. 140 F.3d 1367, 1370 (1998). The same result was reached in *Betts v. Equifax Credit Info. Servs., Inc.*, 245 F. Supp. 2d 1130, 1134 (W.D. Wash. 2003) ("because no 'transaction' took place as required by the statute, plaintiffs' claim falls *outside the scope* of the FDCPA") (emphasis added).

In short, no case in this context supports the proposition that because the FDCPA does not provide a basis for relief, Washington's CPA (or any state law-based claim) cannot provide a basis for relief either. In fact, to hold otherwise would contravene the provisions of the FDCPA itself, which provides that the FDCPA does not affect any state law unless: (i) the state law is inconsistent with the FDCPA; and even then (ii) *only* to the extent that the State law affords a consumer *less protection* than the FDCPA. *See* 15 U.S.C. § 1692n. The CPA, however, is: (i) plainly not inconsistent with the FDCPA; and (ii) obviously provides *greater* protection for consumers to the extent it provides additional limitations on unfair and deceptive conduct.[34]

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[34] The situation is similar with regard to the Collection Agency Act, which explicitly provides that: "The provisions of this chapter [RCW Ch. 19.16] shall be *cumulative and nonexclusive* and *shall not affect any other remedy available at law* ...." RCW § 19.16.900 (emphasis added).

If Farmers was correct, it would mean that Farmers and CCS are utterly unrestrained and have no limitations on the deceptions and other mischief they can employ when trying to obtain money to which they self-servingly claim entitlement, even though the money is not lawfully owed. Thus, Farmers and its agents would be free to demand payment through repeated phone calls at odd hours of the night or at work, threaten persons with debtor's prison or make other misrepresentations, or do anything else they thought might loosen the wallets of its targets. According to Farmers, there would be no relief under the FDCPA, because it is inapplicable, but no relief under any other statute either, such as the CPA. In other words, while people who actually and truly owe debts are entitled to all sorts of protections against such misconduct, those people who actually owe nothing can be deceived or abused at will without recourse. The argument does not just lead to an absurd result, it is absurd on its face.

G. THE TRIAL COURT HAD AUTHORITY TO ORDER DISCLOSURE OF CONTACT INFORMATION FOR NOTICE AND OTHER PURPOSES

Class actions serve as a vehicle for the resolution of multiple individual claims that are often small, relatively insignificant or which otherwise do not lend themselves to resolution by litigation because it is not economical for the affected individuals to seek judicial redress of the wrong in question. As such, class actions and their proponent

representative or "nominal" plaintiffs are not always subjected to the strictures placed on individual litigants (or at least not in the same way). Thus, it simply is not true that resolution of the nominal plaintiff's claim before formal certification necessarily bars further proceedings or strips the trial court of authority to enter orders protecting the interests of the putative class.

To the contrary, a line of cases in the federal court system under FRCP 23 exists to ensure that absent class members receive protection from the wrongful acts of those who would otherwise seek to take advantage of them. The issue was addressed in *Int'l Broth. Of Elec. Workers v. Westinghouse Elec. Corp.*,[35] an action under Title VII of the Civil Rights Act of 1964. There, a union filed suit "on behalf of Anna Boffen and all women similarly situated" alleging sex discrimination by Westinghouse. Westinghouse counterclaimed against the union for indemnification, and moved to dismiss on the ground that, *inter alia,* because the union had participated in collective bargaining agreements it could not be a representative plaintiff. The Court granted the motion, thus leaving the uncertified class action without a nominal plaintiff.

The Court nevertheless allowed plaintiffs to conduct discovery to

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[35] 25 Fair Empl. Prac. Cas. (BNA) 1093, 20 Empl. Prac. Dec. (CCH) P 30082, 1979 WL 245 (D. Md. 1979).

determine: (1) if other women were injured by the allegedly discriminatory practices; and if so (2) if any of them could qualify as class representative(s):

> Since neither of the individual plaintiffs suffered the requisite injury and the Union is ineligible to serve as a class representative, the Court finds itself like a modern day Ichabod Crane, faced with a headless lawsuit – a class action in search of a representative plaintiff. Fortunately, this Court enjoys an advantage over Mr. Crane and the other residents of the legendary Sleepy Hollow. It has the guidance of the Fourth Circuit Court of Appeals. In *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13, 16 (4th Cir. 1972) and again in *Goodman v. Schlesinger,* 584 F.2d 1325 (4th Cir. 1978), the Fourth Circuit directed district courts faced with similar problems to retain the cases on their dockets for a reasonable time to permit joinder of a qualifying plaintiff.... During the interim, *plaintiffs will have the opportunity to conduct class certification discovery and determine whether there are any women who were actually injured by [defendant's nine-month service requirement] and who can qualify as class representatives....*
>
> The Court will allow the Union's filing to serve as a class filing, even though it now appears that the Union cannot serve as a class representative. *To hold otherwise would unfairly prejudice women who may have relied on the Union to represent their interests and refrained from initiating their own timely actions.*

Id. at 1979 WL 245 at ¶¶7- 8 (all emphases added) (footnotes omitted).

In the *Goodman* case, the district court dismissed plaintiffs' individual claims on the merits at trial, having previously denied certification for failure to satisfy the requirements of FRCP 23(a). On appeal, the Fourth Circuit affirmed dismissal of the named plaintiffs'

individual claims, but still remanded the uncertified class action for further proceedings. The Court noted that, due to the dismissal of their individual claims, the named plaintiffs could not represent any putative class. Regardless, consistent with FRCP 23(d)(2),[36] the Court remanded the matter and instructed the district court to hold it open on the docket for a reasonable time *to allow a proper plaintiff to step forward as a class representative. See Goodman*, 584 F.2d 1325 at 1332-33.

Likewise, in *Cox*, the Fourth Circuit remanded an uncertified class action for further proceedings following dismissal of the individual named plaintiffs' claims. The Court reviewed but rejected the argument that it would be inappropriate to remand the case in the circumstances. The Court cogently observed, moreover, that "affirmance of a dismissal of the class action on that ground would not foreclose any subsequent action on the part of any party with standing to prosecute an action charging illegal discrimination" and noted that "no substantial prejudice" attached to the defendant by the remand. *See Cox*, 471 F.2d at 16. In a similar vein, in *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 100 S. Ct. 1202, 63 L.

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[36] Under CR 23(d)(2): "the court may make appropriate orders: (1) determining the course of proceedings... (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of *any* step in the action, *or of the proposed extent of the judgment*, or of the opportunity of members to ... intervene and present claims or defenses, or otherwise to come into the action..." (emphasis added).

Ed. 2d 479 (1980), the Supreme Court allowed a plaintiff whose claim was mooted by the passage of time and changing circumstances to appeal denial of certification for a class of similarly situated people.[37]

Furthermore, in *Alexander v. Gino's Inc.*, 621 F 2d 71 (3d Cir.) (*per curiam*), *cert. denied*, 449 U.S. 953, 101 S. Ct. 358 (1980), the Third Circuit held that there was no valid distinction between the personal stake of a plaintiff whose claim becomes moot versus that of a plaintiff whose claim is found to be without merit by judgment, concluding that the nominal plaintiff therefore could appeal denial of class certification. Although the Court ultimately upheld denial of certification on other grounds, it stated "[w]e can perceive no reasoned distinction between the personal stake of a person whose claim is mooted and one whose claim is without substantive merit." *Id.* at 73.

In short, for purposes of recognizing standing and jurisdiction, class actions are treated differently than cases that have no class implications. In their opening briefs, Farmers and CCS mostly rely on inapplicable or distinguishable cases. These cases discuss, for example, why discovery should not proceed in dismissed cases between individual litigants that have no class implications, and that never were filed as class

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[37] *See also Deposit Guaruanty Nat'l Bank Jackson, Miss. v. Roper*, 445 U.S. 326, 100 S. Ct., 1166, 63 L. Ed 2d 427 (1980); *Moore v. Matthews,* 69 F.R.D. 406 (D. Mass. 1975).

actions in the first instance. *See, e.g., In re CIS Corp.*, 123 B.R. 488 (S.D.N.Y. 1991); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (2003); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990) (all cited by Farmers); *Marley v. Dept of Labor and Indus. of State*, 125 Wn. 2d 533, 886 P.2d 189 (1994); *Sherry v. State of Illinois,* 55 Ill. Ct. Cl., 2002 WL 32705315 (Ill. Ct. Cl.) (cited by CCS).

CCS also cites federal cases that, because the court initially lacked any original jurisdiction over the matter (*e.g.*, lack of diversity) refused to exercise federal diversity jurisdiction, for class action purposes, over state law claims that might otherwise have been deemed "pendant." *E.g., Hudgins Moving & Storage Co., Inc. v. American Express Co.,* 292 F. Supp. 2d 991 (2003); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 941 (2001). These cases simply do not address the issue of the propriety of the trial court's ruling in any way.[38] These rulings did not prevent the bringing of such cases in state court, and only affected the appropriate exercise of federal court jurisdiction, which is not an issue here.

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[38] Moreover, it also does not avail defendants that this case has not yet been certified and that the rulings to date only affect the proposed representative plaintiff. Unlike *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 828 P.2d 549 (1992) cited by CCS, plaintiff here sued under CR 23 and has discussed and relied on the class action device extensively *ab initio*. The other cases cited by CCS *(e.g., LaMar v. H & B Novelty & Loan Co.,* 489 F.2d 4161 (9th Cir. 1973) involve circumstances where there was no nexus between plaintiff and defendants, unlike here, where the nexus is clear and CCS and Farmers specifically targeted plaintiff and all others similarly situated.

Further buttressing the need to protect the public from wrongs that can only receive redress through the class mechanism under Rule 23, relevant case law has held that even when a proposed class representative has voluntarily settled his case prior to class certification, he still may represent the class (and thereby, *inter alia,* prosecute the appeal of a denial of class certification) despite the fact he no longer possesses an individually viable claim against the defendant. *E.g., Jordan v. Los Angeles County,* 669 F. 2d 1311, 1315-16 (9th Cir. 1982)[39] (holding that even if plaintiff's individual claim was terminated, there remained a "live controversy" between the *proposed class* and the defendant).[40]

The *Jordan* Court went on to assess whether plaintiff retained a "personal stake" in the outcome of the litigation sufficient to qualify him as a class representative in an uncertified class action, where he had settled his individual claim for $500. The Court held that because injunctive relief was sought in the putative class action, *as it is in the instant case*, plaintiff retained a personal stake in its outcome and thus a "live" issue

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[39] *Cert. granted*, judgment vacated by *County of Los Angeles v. Jordan*, 459 U.S. 810, 103 S. Ct. 35, 74 L. Ed. 2d 48 (1982) (in light of *Gen. Tel. Co. of Southeast v. Falcon*, 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

[40] Notably, *Jordan* was decided ten years after and supercedes *LaMar v. H & B Novelty & Loan Co.,* 489 F.2d 461 (9th Cir. 1973), on which CCS relies. Moreover, while it is true that the adoption of a class action does not by itself confer standing to a plaintiff who has no individual claim, that argument begs the question whether the class action should nonetheless survive with representation by a true class member following discovery to that end, or notice to the class of the impending dismissal under CR 23(d)(2).

also continued to exist between plaintiff and defendant because:

> any future injunctive relief granted the class would accrue to the named plaintiff as a class member... here a live controversy still exists between [plaintiff and defendants based on the] requested class-wide injunctive relief.... As a member of the class alleged in the complaint, appellant stands to benefit in the future from any class-wide [injunctive] relief that may be granted...[This] is therefore sufficiently concrete to support Article III jurisdiction."

Id. at 1317-18. Thus, the Court not only maintained the class action, but it further allowed plaintiff to continue as a proposed class representative.[41]

In a concurring and dissenting opinion in *Jordan,* Circuit Judge Schroeder recognized the need to protect absent class members, stating "I would not permit this appellant to pursue this litigation [nonetheless] I would instead remand for consideration of possible intervention by other members of the putative class." *Id.* at 1325. This more conservative approach is precisely what the trial judge did here by requiring disclosure as to the identity of alternative class members.[42] *See* CP at 389.

Once a putative class action is filed, absent class members are

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[41] Ms. Panag submits, therefore, that even were this Court to uphold dismissal of her individual claims, a similar result should obtain, as she likewise can benefit from the injunctive relief sought: the prohibition of the continuance of the "collection notice" scheme.

[42] In a somewhat more extreme example of the leniency accorded absent class members in an effort to protect their otherwise unrepresented interests (albeit in a certified class action) *James v. Jones*, 148 F.R.D. 196 (W.D. Ky 1993) even held that the fact a named plaintiff had been dead for over a year at the time the class was certified still did not warrant dismissal of the class action (as opposed to any individual claims) because the class could proceed with a different class representative.

entitled to rely on its viability, and do not need to file independent additional litigation to protect their interests until they receive adequate notice informing them otherwise. *See, e.g., American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L.Ed.2d 713 (1974). Absent class members will only be in a position to protect their interests if there are notified of proceedings which might affect their rights. Indeed, this is a reason why CR 23(e) provides for notice to a class as the court directs in the event of a dismissal or compromise.

The trial court, acting within its discretion, properly directed defendants to provide contact information for absent class members so that notice could be issued, and so that one or more of such potential class members could assume the role of class representative or file individual claims. The trial court's order plainly serves the underlying policies and purposes of CR 23. Moreover, such a procedure is both appropriate and desirable, particularly so here where defendants appear to assert that an adverse ruling as to Ms. Panag might somehow bind the absent class. It does not, of course, but the mere assertion illustrates the very reasons why class actions, which have broad public implications, are treated differently than actions that only affect the interests of two opposing parties.

Finally, and in any event, here there remains at least two levels of live controversy even were the dismissal of Ms. Panag's individual claim

to be upheld. First, there is a controversy between the putative class and defendants, which remains entirely unresolved based on defendants issuance of thousands of misleading collection notices to extract money from Washingtonians. Second, Ms. Panag retains an interest in the injunctive relief sought prohibiting such misconduct in the future. Thus, plaintiff herself is a viable and appropriate class representative, and the trial court has ongoing authority in the case.[43]

VII. CONCLUSION

For the foregoing reasons, therefore, Respondent/Cross Appellant Rajvir Panag requests that this Court reverse and vacate that portion of the trial court's July 1, 2005, order granting summary judgment in favor of the defendants/appellants, and to affirm that portion of the trial court's July 1, 2005 order directing defendants to disclose the contact information for certain putative class members, and to remand this case to the trial court for further proceedings in accordance with such rulings.

January 17, 2006.

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[43] If, for example, the trial court had instead ruled during class determination proceedings that Ms. Panag was unsuitable to serve as the representative plaintiff because she was atypical (*i.e.*, did not sustain injury), the court would be empowered to order the issuance of notice to absent class members in order to provide them with an opportunity to intervene or otherwise act to protect their interests. The underlying rationale is equally applicable here.

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DECLARATION OF SERVICE

I certify that on January 17, 2006, I caused to be filed with the Court of Appeals, Division I, via messenger, the foregoing Opening Brief of Respondent/Cross-Appellant Rajvir Panag (and copy), and caused to be delivered, via messenger, true and accurate copies to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Seattle, Washington, this 17th day of January, 2006.

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DATED: November 18, 2005 at Seattle, Washington.

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